88-1647

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LARRY L. McKINNON,

Petitioner,

v.

CITY OF BERWYN, a municipal corporation, JOHN CAITHAMER, ROGER MONTORO, NICHOLAS SALERNO, SAMMY CANERDAY, and RONALD VOLANTI,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the Court of Appeals erred in dismissing petitioner's appeal for lack of jurisdiction on the grounds that a motion for prejudgment interest on an attorney's fees award, which was entered as part of a final order, did not suspend the time for appeal on the entire judgment.

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In The

Supreme Court of the United States

October Term, 1988

LARRY L. McKINNON,

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v.

CITY OF BERWYN, a municipal corporation, JOHN CAITHAMER, ROGER MONTORO, NICHOLAS SALERNO, SAMMY CANERDAY, and RONALD VOLANTI,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PRAYER

Petitioner Larry L. McKinnon respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The opinion of the Court of Appeals ("Op."), dismissing the appeal for lack of jurisdiction was entered as an unpublished order, Nos. 88-1516 and 88-1589 and is attached as Appendix A.

JURISDICTION

On October 24, 1988, the United States Court of Appeals for the Seventh Circuit dismissed petitioner's appeal for lack of jurisdiction. On November 2, 1988, the petitioner filed a timely petition for rehearing. The rehearing petition was denied on January 13, 1989. *See* Appendix B. This petition is filed within 90 days of the order denying the petition for rehearing and is thus timely. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

RULE INVOLVED

Rule 59(e), Federal Rules of Civil Procedure, provides as follows:

> Rule 59. New Trials; Amendment of Judgments
>
> . . .
>
> (e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

STATEMENT OF THE CASE

1. District Court Proceedings

On August 28, 1985, pursuant to the entry of a jury verdict on retrial, a Rule 58 judgment was entered on the district court's civil docket. Approximately two years later, on July 30, 1987, the District Court entered an order disposing of certain pending post-trial motions. This final Rule 58 judgment included an award of attorney's fees to petitioner in the amount of $12,825. The Rule 58 judgment, including the judgment for attorney's fees, was docketed on August 4, 1987. On August 11, 1987, the petitioner filed a motion for prejudgment interest on the $12,825 attorney's fee judgment. On March 3, 1988, the District Court granted petitioner's motion for prejudgment interest on the attorney's fee award. On March 17, 1988, petitioner's Notice of Appeal was filed with the Seventh Circuit Court of Appeals.

2. Seventh Circuit Proceedings

On May 19, 1988, the Seventh Circuit, *sua sponte*, raised the issue of the timeliness of petitioner's Notice of Appeal and ordered the parties to file memoranda addressing the jurisdictional issue. *See* Appendix C.

On October 24, 1988, the Seventh Circuit entered an order dismissing petitioner's appeal for lack of jurisdiction. The court found that all post-trial motions were disposed of by way of an order docketed in the district court on August 4, 1987. The Seventh Circuit also found that the district court, in its order of August 4, 1987, had granted petitioner's request for attorney's fees and entered judgment thereon. (Op. at 2.) The court further

found that on August 11, 1987, the petitioner filed three motions relating to the award of attorney's fees. (Op. at 2.) However, the Seventh Circuit held that the decision on the merits became final on August 4, 1987, and that the time to appeal started to run from that date, and not the date judgment was entered on the motions dealing with attorney's fees. (Op. at 2.) In essence, the Seventh Circuit held that an unresolved issue of attorney's fees for the litigation in question did not prevent the judgment on the merits from being final. Therefore, under the Seventh Circuit's analysis, the petitioner's appeal was untimely and was properly dismissed.

REASONS FOR GRANTING THE PETITION

THIS PETITION SHOULD BE GRANTED BECAUSE THE SEVENTH CIRCUIT HAS INCORRECTLY INTERPRETED THIS COURT'S HOLDING IN *WHITE v. NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY* AND *BUDINICH v. BECTON DICKINSON CO.*, TO HOLD THAT A MOTION TO ALTER OR AMEND AN ATTORNEY'S FEE AWARD ENTERED AS PART OF A FINAL JUDGMENT DOES NOT QUALIFY AS A RULE 59(e) MOTION FOR THE PURPOSE OF TOLLING THE 30 DAY APPEAL PERIOD.

This case presents the issue of whether a motion for prejudgment interest on an award of attorney's fees entered as part of the final order of a case constitutes nothing more than a request for attorney's fees or, whether it constitutes a motion to alter or amend under Rule 59(e), F.R.Civ.P., and would, therefore, toll the 30 day appeal period.

In dismissing petitioner's appeal, the Seventh Circuit relied principally on two decisions of this Court. *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445 (1982), and *Budinich v. Becton Dickinson Co.*, 486 U.S. ____, 108 S.Ct. 1717 (1988). Factually, both cases dealt with situations where, after entry of judgment, the prevailing party had made a request for attorney's fees. *White* and *Budinich* both held that a petition for attorney's fees was an independent proceeding which was supplemental to the original proceeding and did not constitute a request for modification of the original decree. Such a petition for attorney's fees, therefore, could not qualify as a motion to alter or amend under Rule 59(e) for the purpose of tolling the 30 day appeal period. The holding in both *White* and *Budinich* appears to be predicated on the understanding that "a motion for attorney's fees is unlike a motion to alter or amend a judgment. It does not *imply a change in the judgment*, but merely seeks what is due because of the judgment. It is, therefore, not governed by the provisions of Rule 59(e)." *White v. New Hampshire Dept. of Employ. Sec.*, 455 U.S. at 452 (emphasis added).

In the instant case, however, the Seventh Circuit has taken the holding set forth in *White* and *Budinich* and applied it to the inapposite factual situation presented here. Specifically, in the case at bar, when the final order was docketed on August 4, 1987, it included a final judgment for attorney's fees in the amount of $12,825. This judgment was entered on the same document which disposed of all post-trial motions addressing the merits of the case. On August 11, 1987, the plaintiff filed three motions, including a motion to alter or amend the judgment for attorney's fees to include prejudgment interest. It is this single fact that distinguishes the instant case from *White* and

Budinich because here plaintiff was seeking "*a change in the judgment*" and not "merely . . . what is due because of the judgment." *White v. New Hampshire Dept. of Employ. Sec.*, 455 U.S. at 452 (emphasis added). The change being the augmentation of part of the judgment with prejudgment interest. The issue of prejudgment interest would "alter the final order or moot or revise decisions embodied in the order" and thus "prevent finality of its resolution." *Budinich v. Becton Dickinson Co.*, 486 U.S. at ____, 108 S.Ct. at 1720. The attorney's fee award here was "embodied" in the final order which the plaintiff was seeking to "alter."

Petitioner submits there can be little question that the judgment for attorney's fees was "embodied" in the final order and that the real issue is whether the motion for prejudgment interest constituted a Rule 59(e) motion to alter the final order. Existing case law firmly supports petitioner's position that his motion for prejudgment interest on the award of attorney's fees constituted a motion to alter or amend under Rule 59(e). Every circuit that has had the opportunity to address the issue has concluded that a motion for discretionary (as was the situation presented here) prejudgment interest *must* be filed pursuant to Rule 59(e). *Scola v. Boat Francis, R., Inc.*, 618 F.2d 147, 152 (1st Cir. 1980); *Goodman v. Heublein, Inc.*, 682 F.2d 44, 45 (2nd Cir. 1982); *Stern v. Shouldice*, 706 F.2d 742, 747 (6th Cir. 1983); *Bricklayer's Pension Trust Fund v. Taiariol*, 671 F.2d 988, 990 (6th Cir. 1982); *Chicago & Northwestern Railway Co. v. Union Packing Co.*, 527 F.2d 592 (8th Cir. 1976); *Osterneck v. E.T. Barwick Industries, Inc.*, 825 F.2d 1521, 1525 (11th Cir. 1987).

Although this Court appears not to have addressed this issue, the overwhelming weight of authority indicates that an award of prejudgment interest pursuant to a post-trial

motion requires an amendment of judgment under Rule 59(e). If that is the case, then plaintiff, in order to obtain prejudgment interest, had no alternative but to file a Rule 59(e) motion to alter or amend the judgment.

The question presented in the instant case, therefore, is whether petitioner's filing of an appropriate Rule 59(e) motion as to the attorney's fee award portion of the August 4th judgment, suspended the finality of the entire judgment. In its order of October 24th, dismissing the appeal, the Seventh Circuit acknowledged that the attorney's fee award was part of the final order entered on August 4, 1987. (Op. at 2.) But, implicit in the Seventh Circuit's opinion is the holding that plaintiff's Rule 59(e) motion to amend part of the judgment suspended the time for appeal only as to the prejudgment interest issue. This reasoning is in conflict with the decisions of the other circuits cited above, with common sense, and indeed with the Seventh Circuit's own holding in *F.E.L. Publications, Ltd. v. Catholic Bishop of Chicago*, 739 F.2d 284 (7th Cir. 1984). There, the Seventh Circuit held that a motion under Rule 59(e) to reconsider or amend part of a judgment suspends the time for appeal as to all issues and all parties. The Seventh Circuit's finding in the instant case therefore is inconsistent with its prior decision that a motion to alter any part of a final judgment suspends the finality of the entire judgment.

The Seventh Circuit's reasoning in this case fails to distinguish the difference between a petition for attorney's fees, which is purely collateral to the entry of final judgment, and a motion for prejudgment interest on an attorney's fee award entered as part of the final order, which is an attack on the final judgment itself. The failure to make this important dinstinction leads to an extension of the rule of law of *White* and *Budinich* not contemplated

by this Court. If the Seventh Circuit's ruling is allowed to stand, a litigant receiving an attorney's fee award, as part of a final judgment and wishing to seek modification or amendment of such a judgment, would be placed in an untenable predicament. Specifically, if he failed to file a Rule 59(e) motion within ten days of entry of judgment, case law clearly indicates he would forfeit his right to seek amendment. If, on the other hand, a motion to amend or alter the part of the judgment awarding attorney's fees is filed within ten days, the litigant is left in doubt as to whether he should file a notice of appeal, notwithstanding the fact that his motion to amend is still pending. A common sense application of the Federal Rules of Civil Procedure and the unmistakable language of the Seventh Circuit in *F.E.L. Publications, supra*, would dictate that a notice of appeal not be filed until after the motion to amend is ruled upon.

The above analysis demonstrates why the holdings in *White* and *Budinich*, are applicable only to pending motions for attorney's fees. Once an award for attorney's fees has been entered as an integral part of a final judgment the whole analysis must change because of the applicability of Rule 59(e). Such an analysis in this case would include the following facts:

(1) The final Rule 58 judgment docketed on August 4, 1987, included a judgment for attorney's fees in a specified sum;

(2) The award of attorney's fees was just as final and just as appealable as any other part of the judgment. *See, Charles v. Daley*, 799 F.2d 343 (7th Cir. 1986) and *Wort v. Verling*, 778 F.2d 1233 (7th Cir. 1985);

(3) It was compulsory that any motion for prejudgment interest on the award of attorney's fees be filed under Rule 59(e). *Stern v. Shouldice, supra, Scola v.*

Boat Francis R., Inc., supra, Bricklayer's Pension Trust Fund v. Taiariol, supra, Goodman v. Heublein, Inc., supra, Osterneck v. E.T. Barwick Industries, Inc., supra, Chicago and Northwestern Railway Co. v. Union Packing Co., supra;

(4) A Rule 59(e) motion to alter or amend any part of a judgment suspends the time for appeal as to all issues. *F.E.L. Publications, Ltd. v. Catholic Bishop of Chicago, supra*; and

(5) The Rule 59(e) motion filed by plaintiff on August 11, 1987, as to the portion of the judgment dealing with attorney's fees, suspended the finality of the judgment and precluded appeal of any issue.

Based on the foregoing, it is apparent that the Seventh Circuit's decision in this case constitutes an unwarranted extension of this Court's holdings in *White* and *Budinich*. Left untouched, the Seventh Circuit's holding is bound to create confusion in an area that this Court has taken pains to clearly define.

CONCLUSION

WHEREFORE, Petitioner Larry L. McKinnon respectfully prays that this Honorable Court grant this petition and issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 24, 1988.

Before

Hon. WILLIAM J. BAUER, *Chief Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*

LARRY L. MCKINNON,

Plaintiff-Appellant,
Cross-Appellee,

Nos. 88-1516 and 88-1589

vs.

CITY OF BERWYN, a municipal corporation,

Defendant-Appellee,
Cross-Appellant,

and

JOHN CAITHAMER, ROGER MONTORO, NICHOLAS SALERNO, SAMMY CANERDAY, and RONALD VOLTANI,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 82-C-2046—Hon. **Ann C. Williams**, *Judge.*

ORDER

On consideration of the "PLAINTIFF-APPELLANT'S MEMORANDUM ON JURISDICTION" and the "MEMORANDUM OF DEFENDANT-APPELLEE, CROSS-APPELLANT REGARDING JURISDICTION,"

IT IS ORDERED that both appeal Nos. 88-1516 and 88-1589 are DISMISSED for lack of jurisdiction.

As to 88-1589, defendant-appellee, cross-appellant admits that its appeal is premature because no judgment has been entered on its petition for attorney's fees.

In 88-1516, the Rule 58 merits judgment was entered on the district court's civil docket on August 25, 1985. Timely post-trial motions were filed; all post-trial motions addressed to the merits of the action were denied in an order dated July 20, 1987 and entered on the district court's civil docket on August 4, 1987. In the same order, the district court granted plaintiff's request for attorney's fees, and judgment awarding attorney's fees was entered on a separate document also on August 4, 1987. On August 11, 1987, the plaintiff filed 3 motions, all relating solely to the award of attorney's fees. The decision on the merits became final on August 4, 1987 when the district court resolved all post-trial motions as to the merits of the case, and the time to appeal started to run. Plaintiff's notice of appeal from the merits judgment filed on March 17, 1988 was more than 6 months late. *See* Fed. R. App. P. 4(a)(4). An unresolved issue of attorney's fees for the litigation in question does not prevent the judgment on the merits from being final. *Budinich v. Becton Dickinson Co.*, 108 S.Ct. 1717, 1721-22 (1988). See also *Exchange National Bank v. Daniels*, 736 F.2d 286 (7th Cir. 1985) (a notice of appeal from an order awarding or denying fees does not "bring up" the judgment on the merits for appellate review).

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 13, 1989.

Before

Hon. WILLIAM J. BAUER, *Chief Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*

Nos. 88-1516 and 88-1589

LARRY L. MCKINNON,

Plaintiff-Appellant,
Cross-Appellee,

VS.

CITY OF BERWYN, a municipal corporation,

Defendant-Appellee,
Cross-Appellant,

and

JOHN CAITHAMER, ROGER MONTORO, NICHOLAS SALERNO, SAMMY CANERDAY, and RONALD VOLTANI,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 82-C-2046—**Ann C. Williams**, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by plaintiff-appellant, cross-appellee, Larry L. McKinnon on November 2, 1988, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 19, 1988.

By the Court:

LARRY L. MCKINNON,

Plaintiff-Appellant,
Cross-Appellee,

Nos. 88-1516 and 88-1589 vs.

CITY OF BERWYN, a municipal corporation, et al.,

Defendant-Appellee,
Cross-Appellant,

and

JOHN CAITHAMER, ROGER MONTORO, NICHOLAS SALERNO, SAMMY CANERDAY, and RONALD VOLTANI,

Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 82-C-2046—**Ann C. Williams,** *Judge.*

ORDER

The court, on its own motion, orders that these appeals are CONSOLIDATED for purposes of briefing and disposition.

A preliminary review of the short record indicates that the orders appealed from may not be appealable.

Where a district court has entered a final judgment on the merits of a case, the entry of a subsequent order granting or denying an award of attorneys' fees pursuant to statute is a separate proceeding having no effect on the finality of the merits judgment. See *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445 (1982); *Exchange National Bank v. Daniels*, 763 F.2d 286, 289-94 (7th Cir. 1985). As to appeal No. 88-1516, the Rule 58 merits judgment was entered on the district court's civil docket on August 25, 1985. The defendants filed timely post-trial motions which were denied in a minute order dated July 30, 1987 and entered on the district court's civil docket on August 4, 1987. Plaintiff's notice of appeal was filed more than seven months later. Therefore, it appears that plaintiff McKinnon's appeal of the merits judgment is untimely. See Fed. R. App. P. 4(a)(4); *Exchange National Bank v. Daniels, supra* (a notice of appeal from an order awarding or denying fees does not "bring up" the judgment on the merits for appellate review).

In the cross-appeal, docketed as No. 88-1589, defendant City of Berwyn states that it appeals the denial of its petition for attorneys' fees. However, it not only appears that the district court entered no Rule 58 judgment on the petition, but it appears that the district court made no ruling at all on the petition, making this appeal premature. Accordingly,

IT IS ORDERED that all parties shall file, on or before June 1, 1988, brief memoranda addressing both jurisdictional issues raised herein and stating why these appeals should not be dismissed for lack of jurisdiction. A motion for voluntary dismissal pursuant to Fed. R. App. P. 42(b) will satisfy this requirement. Briefing shall be held in abeyance pending further court order.